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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-714

MYRON F. HEILIG,

Petitioner,

v.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Respondents in their Brief in Opposition (No. 75-714) have intentionally misstated the facts in both their "Statement Of The Case" and their "Argument" sections. The most glaring misrepresentation is the allegation by Respondents that Petitioner never tendered a money offer to Respondents. As is discussed below in greater detail and in an affidavit of Jeffery Green, Esquire (with copy of tender offer check, Appendix A), there were indeed tender *offers* made.

However, for the sake of brevity and clarity, this Reply Memorandum will be broken down into those two sections of Respondents' Brief and will respond to those assertions presented by Respondents in the order asserted.

STATEMENT OF THE CASE

Respondents allege that because the lease was not recorded it was not a cloud on title, "a fact which was accepted by the district court". (Pg. 4, Opp. Br.) The district court neither made a finding nor "accepted" any finding on this point. There was an outstanding lease (Kogelschatz) that was capable of being recorded and thereby clouding title. Therefore, the partners (each of whom was a fiduciary) stipulated that before there would be any conveyance of property, or any final settlement of accounts, such lease had to be judicially cancelled. The Arbitrator was powerless to conclude until such cancellation occurred.

Petitioner excepts to the first two sentences relating to bankruptcy and the amount that was alleged lost on the property for the reason that there is nothing in the record to support such statements. (Pg. 5, Opp. Br.)[1] To the contrary, although under compulsion of a Subpoena Dueces Tecum, Respondent Weiss refused to

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[1] Although Respondents assert substantial losses of approximately $375,000.00, in the California case against the Kogelschatz Korp. (defaulting tenant), the Judge awarded only $38,474.00 in damages. It would appear that damages by Mr. Weiss were far less than alleged. (See Appendix B, letter from Thomas A.H. Hartwell, Esquire, to Myron F. Heilig, herein.)

produce partnership records during the hearing and Judge Christensen refused to compel same.

Respondents suggest that Petitioner refused to pay sums of money and Petitioner replies that amounts in addition to those alleged by Respondents were paid. (Pg. 5, 6, Opp. Br.) In this connection, Petitioner paid substantial amounts during the inception of the partnership and subsequent thereto.

Concerning the Judge O'Donnell Order, (Pg. 8, Opp. Br.), Respondents allege "(N)o one even suggested a stay of the closing." Such suggestion was totally unnecessary because of the scope of the O'Donnell Order (Petition For Certiorari, Appendix G, at 32a). That Order suspended the arbitrator's authority to "close" adversely to Heilig on February 22, 1973. Furthermore, all parties were before the court at that point and therefore the arbitrator had been divested of his authority. He could not legally proceed with the February 22nd hearing-"closing".

ARGUMENT

In response to Section I of the Argument commencing at page 10 of the Brief In Opposition, Petitioner Heilig asserts that the alleged hearing-"closing" was invalid for four reasons: First, no notice of hearing was ever served upon Heilig as required by the Rules of the American Arbitration Association. (App. H, Pet. for Cert., 33a) Secondly, the partnership had entered into a lease of the real property with the Kogelschatz Korp., a California corporation. One of the

terms of the partnership stipulation occuring during the course of the arbitration proceedings involved the parties' agreement that there would be no closing until such time as the Kogelschatz lease was judicially cancelled by the courts of Nevada, a condition which remains, to this date, unsatisfied. Thirdly, Petitioner Heilig did not attend the hearing-"closing" on advice of counsel. Fourthly, it was learned that Judge O'Donnell, in a hearing earlier the same day of the alleged hearing-"closing", refused to confirm the awards and ordered that Heilig be given until March 9, 1973 to file his objections to the awards. This judicial action terminated any arbitrator authority to penalize Heilig for his non-attendance at the February "closing". Nonetheless, Heilig was and continues to be penalized by the arbitrator's action.

In reply to Section II of the Argument at page 13, Petitioner would urge that the O'Donnell Order affected the closing for two reasons. First, commencing a week before the closing, Respondent Weiss brought himself before the jurisdiction of the district court to confirm the awards. Once before that Court, any possible jurisdiction was lifted from the arbitrator. Secondly, the Court, by granting Petitioner Heilig time in which to object to the award, committed itself to giving Heilig that time period. But the effect of what was done was to impose a million dollar forfeiture upon your Petitioner. The February 22nd hearing-"closing" was a legal nullity. Pertaining to the Respondents' second point, even if notice to Heilig's attorney is imputed to Heilig, which is not conceded, a mere technical objection such as this should not sustain the improper action by the Nevada Supreme Court in its refusal to

grant a Writ of Mandamus, which action sanctioned the judicial confiscation of Heilig's property by the written order of Judge Christensen. That order, which purported to confirm the award in fact, modified it and thereby deprived Heilig of that property awarded to him by the arbitrator.

On page 14 of the Petition in Opposition, Respondents state:

> "There was not a tender of any sum of money to the district court in connection with Heilig's attempt to amend the court's findings, nor was there a tender at any other time during the proceedings in either the district court or the Nevada Supreme Court".

To the contrary, there was a tender offer of $100,000.00 made on Petitioner Heilig's behalf. (Affidavit and Check Exhibit, of Jeffrey G. Green, Counsel for purchasers, Appendix A herein). That offer was made on March 18, 1974, at approximately 2:00 P.M. in the Chambers of Judge Christensen. The Green Affidavit recites the position then (and now) espoused by Weiss and his Counsel, Steve Morris of the firm of Lionel, Saywer, Collins and Wartman, to wit: that Heilig had been divested of all property and had nothing to sell. Later on that same date, in open court, Petitioner's counsel, Eric Zubel, tendered offers. See Transcript of Proceedings in the Eighth District Court of the State of Nevada in and for the County of Clark dated March 18, 1974 at 3:00 P.M. at pages 5 and 18, 19.

Concerning the variance between the district court's oral announcement and its written order, Petitioner has examined the supporting cases cited by Respondents and believes that they are easily distinguishable based upon the fact that Petitioner Heilig in reliance on the

bench order acted to his detriment. Further, the written order did not confirm the arbitrator's award as purported, but modified that award to divest Heilig of his properties–a power that the Judge was without. (N.R.S. 38.135)

In Section 4 at page 15, of their Brief, Respondents cite *Washoe Company v. Reno*, 77 Nev. 152 (1960) as support for the proposition that Mandamus "is not proper even if a possible legal remedy is not as plain, speedy and adequate a remedy as is provided by Mandamus . . ." *Washoe* involved the question of whether mandamus was an appropriate remedy to compel a Board of County Commissioners to apportion a general road fund as provided by statutory law. Apart from the facts which readily distinguish the two cases, in the *Washoe* case, the function of the trial court differed from the function of the trial court in this case. In *Washoe*, the court assumed the traditional judicial function. The role of the trial judge in this case was a ministerial function. A proceeding was commenced to merely confirm the arbitrator's award, yet the court's written order does not confirm the arbitrator's award, it alters it. The Court was not empowered to summarily make such alteration. Mandamus is appropriate to set aside an erroneous order where the making of the order is a ministerial function. See generally, *Mandamus*, 55 C.J.S., Section 89.

On Page 15, Respondents cite the cases of *Morgan v. Hines* and *Simmons v. Superior Court* as authority for the statement that merely because the Petitioner was unsuccessful in his attempt, does not mean that he has been denied due process. The first case, *Morgan v. Hines*, 113 F.2d 849 (D.C. Cir. 1940) is readily

distinguished upon the fact that Section 19 of the World War Veterans Act provided that the exclusive remedy with respect to such claims was reposed in the Federal District Courts. Because that remedy was exclusive, mandamus was not appropriate.

In the case of *Simmons v. Superior Court*, 341 P.2d 13 (1959; S. Ct. Cal.) the Court held that where an order of dismissal was entered into the minutes of the Court by the clerk pursuant to instructions given by the Judge in Chambers and although Petitioner was required to appeal within 60 days therefrom, Petitioner had failed to do so because the clerk had never sent him notice of the order. Certiorari was not available to Simmons. That case is readily distinguishable on the fact that the Defendants' demurrer to a second amended complaint was sustained, with leave granted to Simmons to amend. Thereafter, "Notice of Motion To Dismiss" was filed on the ground that Petitioner had failed to amend his Complaint within the time period allowed by the Court. After a hearing, Petitioner announced that he would like to stand on his Pleadings and opposed the Motion to Dismiss on the grounds that the demurrer had been improperly sustained. The Judge thereafter granted the Motion to Dismiss. The case at bar involves no amended complaint and no demurrer. More importantly, this case does not involve one single instance, unlike *Simmons*, where Heilig does not respond in timely fashion to an instruction from the Court relating to the date and deadline for filing Pleadings, a factor believed to be controlling to the *Simmons* court. Furthermore, the Nevada Supreme Court by its action in ordering the parties to file written briefs and prepare for oral argument suggested

that Mandamus indeed was an appropriate action. That suggestion is further confirmed by Rule 21(b) of the Nevada Rules of Appellate Procedure which provides:

> "If the Court is of the opinion that the Writ should not be granted, it may deny the Petition. Otherwise, it may enter an order fixing time within which an answer directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ may be filed by the respondents . . . The Court shall by order advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument."

Indeed if the Supreme Court of the State of Nevada was of the opinion that the Writ of Mandamus was not an appropriate action, it should have denied same *instanter* or alternatively, when denying Mandamus, grant unto the Petitioner a reasonable time in which to pursue his appeal. By doing neither, Petitioner was judicially denied an opportunity to appeal.

On Page 16, respondents state that Heilig need only have filed a "simple, one-page Notice of Appeal within the next thirty days" (after the District Court entered its Order confirming the award of January 28, 1974 while a stay was in effect). They cite *Jumbo Mining Co. v. District Court*, 28 Nev. 253 (1905), as authority for this proposition. It is inapposite. That case involved questions of whether the lower court should have dissolved an injunction and discharged an appointed receiver based upon lack of jurisdiction and secondly an issue regarding the fees to be paid to the receiver by an innocent party. The case does not discuss initial steps in appellate procedure. Petitioner, to the contrary, strongly urges the following: (1) The District Court illegally entered its Order confirming the award because

the Supreme Court of Nevada had issued a Stay; (2) Commencing with Rule 3, *et seq.* of the Nevada Rules of Appellate Procedure, appellate procedure is set forth and *far more steps* would have to be taken than a simple notice. Indeed, one of the reasons why Petitioner sought review by Mandamus was because he was in no financial position to post a supersedeas bond which would have been required-a financial position, incidentally, brought about exclusively by Heilig's unfortunate association with his partners, the parties who have profited from this litigation. The Nevada Supreme Court recognized Heilig's dilemma, when it twice refused to grant respondents' motions to require such a bond.

The importance and substantiality of the questions presented have not been refuted; rather, the brief in opposition highlights the gross injustices which have been inflicted upon Petitioner. Because Heilig did not attend an illegal hearing-"closing", the Court has divested him of two-thirds of the property in which he had an interest. With respect to the remaining one-third, which was awarded to Heilig, the title is clouded and the property encumbered. Outstanding judgments have been assessed against Petitioner Heilig without the right to question those judgments. Those judgments lack the basic *quid pro quo* providing for the conveyance to Heilig of his property in the event the judgments are met which was provided for by the arbitrator. Heilig attempted to satisfy those judgments, but the respondents rejected his efforts.

In conclusion, Petitioner respectfully submits that the Supreme Court is virtually mandated to hear this case because of Supreme Court Rule 19(1)(b) which provides:

> "as a basis for issuing certiorari, [W]here a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The actions taken by the Nevada Courts have so departed from the constitutional norms, as is set forth commencing at page 18 *et seq.* of the Petition for Certiorari, that flagrant violations of due process have been inflicted upon your petitioner.

WHEREFORE, Petitioner prays that the Petition for Writ of Certiorari be granted for reasons stated in the Petition and in this reply brief.

Respectfully submitted,

WILLIAM C. CRAMER
BENTON L. BECKER
ARTHUR R. AMDUR
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475 L'Enfant Plaza, S.W.
Suite 4100
Washington, D.C. 20024
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Date: January 9, 1976

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-714

MYRON F. HEILIG,

Petitioner,

vs.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

AFFIDAVIT OF JEFFREY G. GREEN, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

JEFFREY G. GREEN, Esq., being first duly sworn, deposes and says:

1. That he is an attorney of law duly licensed to practice law in the State of Nevada maintaining offices at 316 East Bridger Avenue, Las Vegas, Nevada. That

on or about March 18, 1974, your Affiant was employed by the law firm of JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY AND KAUFMAN, 302 East Carson Avenue, Suite 620, Las Vegas, Nevada, and was associated with CLIFFORD A. JONES, Esq., as an attorney for ROBERT LEE, LTD., a Canadian corporation. That your Affiant became involved with the representation of that corporation in connection with the contemplated acquisition by the corporation of certain land in Las Vegas, Nevada, awarded to MYRON F. HEILIG in earlier arbitration proceedings relative to an attempted dissolution of a partnership involving HEILIG, WEISS and SHULMAN.

2. On or about March 18, 1974, your Affiant became aware of the fact that there existed certain difficulties relative to the condition of the title of the above property. Your Affiant became further aware that there was, at that time, certain pending litigation in the Eighth Judicial District Court for the State of Nevada, Case No. A 96771, which involved post-arbitration proceedings concerning the subject property. In the process of investigating the circumstances of this litigation, your Affiant determined that there existed outstanding judgments on behalf of ROBERT WEISS and JACK SHULMAN, against MYRON F. HEILIG, in the approximate sum of $100,000.00, satisfaction of which your Affiant understood to be a precondition to the acquiring of MYRON F. HEILIG'S clear title to the subject property.

3. On March 18, 1974, at approximately 2:00 p.m., your Affiant met in the chambers of the Honorable CARL J. CHRISTENSEN, District Judge, in connection with further proceedings in WEISS v. HEILIG, et al. Also present at that meeting were STEVE MORRIS,

Esq., attorney for ROBERT WEISS, ERIC ZUBEL, Esq., attorney for MYRON F. HEILIG, and CLIFFORD A. JONES, Esq., who, along with your Affiant, represented the interest of ROBERT LEE, LTD. in the capacity of *amicus curiae*. The purpose of that meeting was to attempt to resolve the issue of HEILIG'S title to the subject property prior to oral argument on HEILIG'S Motion for Rehearing on the Motion to Confirm the Arbitrator's Award previously granted by Judge CHRISTENSEN. At that meeting, your Affiant was present when CLIFFORD A. JONES, Esq. represented to Judge CHRISTENSEN that JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY AND KAUFMAN would, on behalf of ROBERT LEE, LTD., pay to HEILIG the sum of $100,000.00, as and for a down payment on the property if HEILIG could present Affiant's client with clear title to said property; that a copy of the check for $100,000.00 is attached hereto, marked Exhibit "A" and, by this reference, made a part hereof. At that meeting, your Affiant also heard STEVE MORRIS, Esq. make representations to Judge CHRISTENSEN to the effect that HEILIG had no remaining interest in the partnership property which could be the subject of the sale to ROBERT LEE, LTD. and, therefore, HEILIG should not be permitted to encumber property belonging to WEISS.

/s/ Jeffrey G. Green
JEFFREY G. GREEN, Esq.

SUBSCRIBED AND SWORN to before me
this 31st day of December, 1975.

/s/ Kathryn A. Kessler
NOTARY PUBLIC

NOTARY PUBLIC – STATE OF NEVADA
CLARK COUNTY
Kathryn A. Kessler
My Commission Expires Feb. 16, 1979

THE ROYAL BANK OF CANADA

No. 948

MAIN & HASTINGS BRANCH
400 MAIN STREET
VANCOUVER, B.C.

March 13 19 74

PAY TO THE ORDER OF JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY & KAUFMAN U.S. $ 100,000.00

----------ONE HUNDRED THOUSAND----------00/100 DOLLARS

Re Fairway Gdns
Las Vegas

ROBERT LEE LTD.

⑆07120⑈003⑆ 136⑈656⑈6⑈

5a

EXHIBIT A

APPENDIX B

COOLEY, GODWARD, CASTRO, HUDDLESON & TATUM

LAW OFFICES

April 23, 1975

Myron F. Heilig
Apartment 13I
95 Christopher Street
New York, NY 10014

Re: Weiss v. Kogelschatz

Dear Mr. Heilig:

I am in receipt of your letter of April 14, 1975.

The judge has now indicated that he will give a judgment in favor of plaintiff in the sum of $38,474.00. The judge has not as yet filed a final judgment.

I am disappointed in the size of the award. It remains to be seen whether there will be any appeal on behalf of plaintiff. There are serious questions as to any collectibility of any judgment. Defendants' attorney has consistently advised this office that his client has no money whatsoever.

I note your statement that you "wish to receive directly my share (1/3) of all sums paid over by way of settlement." The extent to which any sums should be paid "directly" to you, it seems to me, would have to be a matter between you and Mr. Weiss. This office is not going to get involved in any dispute between you and Mr. Weiss, as it is not prepared to represent either one of you against the other.

Yours very truly,

Thomas A. H. Hertwell

TAAH/mf
cc: Robert C. Weiss